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Nos. 88-515 and 88-525

In The

Supreme Court of the United States

October Term, 1988

No. 88-515

SABLE COMMUNICATIONS OF CALIFORNIA, INC.,

Appellant,

vs.

FEDERAL COMMUNICATIONS COMMISSION and RICHARD L. THORNBURGH, ATTORNEY GENERAL OF THE UNITED STATES,

Appellees.

No. 88-525

FEDERAL COMMUNICATIONS COMMISSION and RICHARD L. THORNBURGH, ATTORNEY GENERAL OF THE UNITED STATES,

Appellants,

vs.

SABLE COMMUNICATIONS OF CALIFORNIA, INC.,

Appellee.

On Appeal From The United States District Court For The Central District Of California

MOTION FOR LEAVE TO FILE A BRIEF AMICUS CURIAE IN SUPPORT OF THE FEDERAL COMMUNICATIONS COMMISSION AND RICHARD L. THORNBURGH, ATTORNEY GENERAL OF THE UNITED STATES AND BRIEF AMICUS CURIAE OF AMERICAN FAMILY ASSOCIATION, INC.

PEGGY M. COLEMAN
P.O. Drawer 2440
107 Parkgate Drive
Tupelo, Mississippi 38803
(601) 844-5036

Counsel of Record
For Amicus Curiae

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MOTION FOR LEAVE TO FILE A BRIEF AMICUS CURIAE IN SUPPORT OF THE FEDERAL COMMUNICATIONS COMMISSION AND RICHARD L. THORNBURGH, ATTORNEY GENERAL OF THE UNITED STATES, APPELLANTS

American Family Association, Inc. (AFA), Moving Party herein, respectfully moves this Honorable Court for an order granting leave to file the attached Brief Amicus Curiae. AFA has requested and received permission from Appellants by their attorney, Mr. William C. Bryson, Esq., but have received no response from Appellee, Sable Communications of California, Inc., by its Attorney, Mr. Richard K. Simon, Esq.

The attached Brief supports the position of the Appellants in this case. The issue before this Court concerning the viability of the indecency standard to telephone messages will significantly affect the position of Amicus as it seeks

to participate in the enforcement process before the Federal Communications Commission as it concerns telephone and broadcast material.

INTEREST OF AMICUS CURIAE

American Family Association, Inc. is a non-profit corporation, incorporated in Mississippi in 1977 under its original name of National Federation for Decency, Inc. (NFD). AFA continues to operate as a leader of citizen and church participation to promote traditional family values through the media. AFA has members in all 50 states; over 480 chapters of local citizens; and over 360,000 subscribers to its newsletter, AFA Journal.

AFA has continually called for legal

action against providers of indecent and obscene telephone messages. It has attempted to encourage legal sanctions against dial-a-porn providers and economic sanctions against those businesses that facilitate the dissemination of the messages.

AFA has local chapters all across the country which seek to have the dial-a-porn laws enforced. Such chapters maintain their own structure, but they seek advice from AFA regarding legal precedents in their states and other jurisdictions where legal issues are decided that affect local action. AFA believes that the enforcement of civil and criminal laws against indecent and obscene material is essential to reducing the flow of such illegal material and mitigating its impact on the family.

AFA is constantly requested by local governments and individuals for advice and guidance on methods to enforce and improve existing laws regarding the distribution of indecent and obscene material.

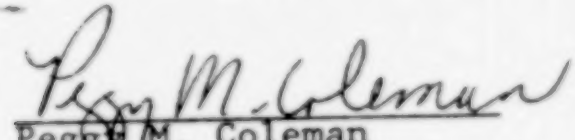
Serious efforts have been under way to protect children through the regulation of indecent and obscene dial-a-porn messages since 1983. In the interest of continuing to inform citizens regarding their ability to protect themselves from indecent and obscene dial-a-porn messages this action is most important to the inquiry. The parties have extensively written comprehensive arguments and AFA will not repeat them. Rather, AFA will highlight certain concepts it wishes the Court to consider.

The ability of AFA to call for such

sanctions against dial-a-porn providers has been fundamentally affected by the court's ruling. Amicus and the citizens they represent would be severely harmed by affirming the District Court for the Central District of California and the Ninth Circuit finding with respect to the constitutionality of the statute prohibiting indecent telephone messages.

Therefore, AFA respectfully requests this Honorable Court to grant leave to file the attached Brief Amicus Curiae in this important case and to affirm in part and reverse in part the decisions of the court below.

Respectfully submitted,



Peggy M. Coleman
Attorney for AFA

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SUMMARY OF ARGUMENT

I. THE FEDERAL STATUTE PROHIBITING OBSCENE MATERIAL TRANSMITTED BY TELEPHONE IS NOT FACIALLY UNCONSTITUTIONAL

The Congress has the authority to prosecute the interstate dissemination of obscene material. The use of interstate telephone facilities to disseminate obscene material is no different from using the United States mail system or the federal highway system. Dial-a-porn providers are using a means of interstate commerce to transmit obscene material.

II. THE PROHIBITION AGAINST THE TRANSMISSION OF INDECENT TELEPHONE MESSAGES IS NOT FACIALLY UNCONSTITUTIONAL

This Court has historically recognized the government's ability to

regulate indecent, non-obscene material. The indecency concept, as recognized in broadcasting regulation, is applicable to dial-a-porn services. The societal interests and technological parameters involving both broadcasters and dial-a-porn providers are significantly similar. Consequently, the indecency concept is equally applicable.

LAW AND ARGUMENT

I. THE FEDERAL STATUTE PROHIBITING OBSCENE MATERIAL TRANSMITTED BY TELEPHONE IS NOT FACIALLY UNCONSTITUTIONAL

A. The Federal Dial-A-Porn Statute Does Not Create An Impermissible Obscenity Test

Title 47 U.S.C. §223(b) prohibits the transmission of recorded or live obscene telephone messages. Appellees have maintained that this statute unconstitutionally prescribes a national obscenity standard. This argument was rejected by the court below and has been consistently rejected by previous federal courts. As the basis for their argument Appellees rely on language in Miller v California, 413 U.S. 15, 32 (1973), in which the Court stated, "It is neither realistic nor constitutionally sound to

read the First Amendment as requiring the people of Maine or Mississippi to accept public depiction of conduct found tolerable in Las Vegas, or New York City." The application of a federal statute to an obscene transmission presents the same considerations of community standards as does any other federal obscenity statute. In Hamling v United States, 418 U.S. 87, 106 (1974), the Court stated:

> The fact that distributors of allegedly obscene material may be subjected to varying community standards in the various federal judicial districts into which they transmit the materials does not render a federal statute unconstitutional because of the failure of application of uniform national standards of obscenity. Those same distributors may be subjected to such varying degrees of criminal liability in prosecutions by the States for violations of state obscenity statutes; we see no

> constitutional impediment to a similar rule for federal prosecutions.

See also, Smith v United States, 431 U.S. 291, 302 (1977); United States v Orito, 413 U.S. 139 (1973); and United States v 12 200-ft Reels of Film, 413 U.S. 123 (1973).

Clearly 47 U.S.C. §223(b) does not create a national standard for obscenity. The same concept of community standards set forth by the Hamling Court are applicable to the statute now before this Court. If Appellee's arguments were accepted, it would effectively eliminate any federal regulation of obscene material through the telephone or otherwise.

Individuals or corporations which are in the business of selling sexually explicit material, whether in the form of

magazines, films or telephone messages, have been given sufficient notice of the law and its potential for variation as applied in the several states.

II. THE PROHIBITION AGAINST THE TRANSMISSION OF INDECENT TELEPHONE MESSAGES IS NOT FACIALLY UNCONSTITUTIONAL

A. The Indecency Standard Is A Legally Recognized Standard

Title 47 U.S.C. §223(b) prohibits the transmission of indecent dial-a-porn messages. This Court first examined the indecency standard in Pacifica Foundation v Federal Communications Commission, 438 U.S. 726 (1978). The ultimate ruling in Pacifica was that the FCC had the power to regulate "indecent" broadcasts and that the government's power in this context goes beyond the proscription of the obscene. In discussing the indecency concept as applied to the broadcast medium, the Court stated that "the constitutional protection accorded to a communication containing such patently offensive sexual and excretory language

need not be the same in every context." 438 U.S. at 746-47.

The Court offered two primary reasons for its decision. First: "[T]he broadcast media have established a uniquely pervasive presence in the lives of all Americans. Patently offensive, indecent material presented over the airwaves confronts the citizen, not only in public, but also in the privacy of the home, where the individual's right to be left alone plainly outweighs the First Amendment rights of the intruder." 438 U.S. at 748. Secondly, "broadcasting is uniquely accessible to children, even those too young to read. Although Cohen's written message might have been incomprehensible to a first grader, Pacifica's broadcast could have enlarged a child's vocabulary in an instant." 438 U.S. at 749.

The Court also recognized that the FCC's development of the indecency concept rested on a nuisance rationale. Therefore the indecency concept involves the recognition of several variables. Time of day has always been a pivotal consideration in the indecency concept. 438 U.S. at 750. In addition, the Court has stated that the composition of the audience is a factor to be examined in determining whether certain material is indecent. 438 U.S. at 750. It is important to note that material that may be found to be indecent at 3 o'clock in the afternoon may not be indecent at 3 o'clock in the morning. Consequently, indecency, as a concept has a built-in flexibility that is not found in the obscenity concept.

The Court rejected the contention

that its ruling would "reduce adults to hearing only what is fit for children", contrary to the principles set forth in Butler v Michigan, 352 U.S. 380 (1957). The Pacifica Court found that adults could hear this material through other mediums of communications thus making such regulation appropriate.

B. The Indecency Standard Is Equally Applicable to Dial-A-Porn Messages

In finding that the broadcast medium was entitled to a lesser level of First Amendment protection, the Court listed two primary reasons for the restrictions: the pervasiveness of the medium and the accessibility to children. 438 U.S. at 748-49. These criteria are equally applicable to the dial-a-porn providers.

First, the dial-a-porn providers have transformed the telephone into a broadcasting device. Dial-a-porn services do not create or facilitate a situation in which one adult is calling another adult to engage in spontaneous conversation.

In Carlin Communications, Inc. v Federal Communications Commission, 749

F.2d 113, 114 (2d Cir. 1984), the court found:

> Carlin Communications, Inc. provides a telephone "service," colloquially called "dial-a-porn," to local and long distance callers at ordinary rates. The callers hear prerecorded messages, which change several times daily as in the case of weather or sports results, describing actual or simulated sexual activity apparently in explicit terms. A dial-it service can receive up to 50,000 calls per hour to an individual number, and, rather incredibly 800,000 calls per day were made to dial-a-porn in May, 1983; 180,000,000 calls in the year ending February, 1984.

In Carlin Communications, Inc. v Mountain States Telephone and Telegraph Co., 827 F.2d 1291 (9th Cir. 1987), the court stated that "[t]he technology of that [976] network differs fundamentally from that of basic phone service. As pointed out above, individuals do not

speak to each other on the 976 lines. Instead, 'over 7,900 callers can be connected simultaneously to the same recorded message.' Carlin Communication, Inc. v FCC, 787 F.2d 846, 850 (2d Cir. 1986). Under these circumstances the telephone company resembles less a common carrier than it does a small radio station." 827 F.2d at 1294. Consequently, the court recognized that because the telephone was not being used as traditional common carrier, the concepts of traditional common carrier law did not apply.

In enacting the Telephone Decency Act, Congress, too, recognized that the traditional concepts of telephone regulation could not be effectively applied to dial-a-porn message services. This statute was the result of efforts to

solve the dangers posed by dial-a-porn services after attempts to resolve the problems through the application of traditional common carrier concepts had repeatedly failed. "This measure is necessary because the current regulations adopted by the FCC are not effective in stopping the spread of dial-a-porn to minors." 134 Cong. Rec. H1690 (daily ed. April 19, 1988) (statement of Rep. Hall).

Most, if not all, of the concerns enumerated by the Pacifica Court are present in the regulation of indecent dial-a-porn messages. First, the telephone has established a uniquely pervasive presence in the lives of Americans. These calls can confront a citizen, including a child, not only in public, but also in the privacy of the home. Telephones are routinely found in

homes, offices, public buildings, churches, schools, street corners, automobiles and like a radio or television, may be separately portable. Second, but more importantly, dial-a-porn services, like radio or television broadcasts, are uniquely accessible to children who are able, at an early age, to dial the seven-digit numbers.

The accessibility and enticement of dial-a-porn services to children is significantly more direct than the subject broadcasts of Pacifica. Children may find these numbers on newsracks on street corners, traded in schools or on business cards specifically distributed by the dial-a-porn services. Unlike the passivity of most broadcasts, dial-a-porn services engage in the active enticement

of its potential audience, including children.

Contrary to the allegations of the dial-a-porn providers, 47 U.S.C. §223(b) will not impose a standard contrary to that stated in Butler v Michigan. The indecent material available through the dial-a-porn services will continue to be available to adults who wish to hear it through other media. In addition, under the nuisance rationale supporting the indecency concept, material that would be unlawful at one time of the day may be lawfully disseminated at other times.

CONCLUSION

The District Court for the Central District of California and the Ninth Circuit Court correctly found that Congress has the Constitutional authority to proscribe obscene dial-a-porn messages. This decision is consistent with the long line of cases which support federal obscenity regulation.

This decision simply supports federal efforts to control a problem that is rapidly increasing in scope and severity. The prohibition of obscene dial-a-porn messages is consistent with the general statutory scheme and judicial interpretation of federal obscenity laws.

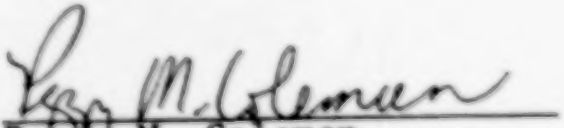
The District Court for the Central

District of California and the Ninth Circuit Court improperly held that the prohibition against indecent dial-a-porn messages was facially invalid. The interests to be protected through the prohibition against indecent telephone messages are substantially the same as those that were subject to protection under the broadcasting regulations. The nature of the telephone services and the broadcasting medium are substantially similar. Consequently, the principles of indecency regulation as stated in Pacifica are equally applicable to the dial-a-porn telephone services.

For these reasons, in addition to those urged by Appellants herein, the

decision below should be affirmed in part and reversed in part.

Respectfully submitted,
American Family
Association, Inc.



Peggy M. Coleman
Legal Counsel
Attorney for Amicus

CERTIFICATE OF SERVICE

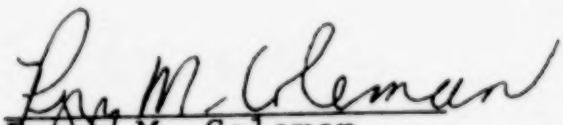
I hereby certify that three copies of the foregoing Motion for Leave to File a Brief Amicus Curiae in Support of the Federal Communications Commission and Richard L. Thornburgh, Attorney General of the United States and Brief Amicus Curiae of American Family Association, Inc., have been mailed this twenty-third day of February, 1989, to the following counsel of record:

Mr. Richard K. Simon
McDermott, Will & Emery
2029 Century Park East
Suite 3800
Los Angeles, California 90067
(213) 277-4110

Mr. William C. Bryson
Acting Solicitor General

United States Department of Justice
Washington, D.C. 20530
(202) 633-2217

All parties required to be served have been served.



Peggy M. Coleman
Attorney for Amicus Curiae